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Board of Forestry and Fire Protection

CAL FIRE's Brief on the Appeal from Denial of Eligibility of San Jose Water Company for Nonindustrial Timber Management Plan 1-06NTMP-012 SCL

Introduction

In this appeal, the California Board of Forestry and Fire Protection ("Board") has a single issue to decide: whether The California Department of Forestry and Fire Protection ("CAL FIRE") correctly denied the San Jose Water Company ("SJWC") eligibility to obtain a Nonindustrial Timber Management Plan ("NTMP") pursuant to the Forest Practice Act ("FPA") Public Resources Code ("PRC") section 4593.2(b). To determine whether SJWC was eligible to obtain an NTMP, CAL FIRE analyzed a threshold issue, the number of acres of timberland owned by SJWC. CAL FIRE analyzed data received from SJWC's own contractor Big Creek Lumber Company and applied the FPA definition of "timberland" found at PRC section 4526 and guidelines contained in CAL FIRE's Policy Manual, section 5412 (attached hereto as Exhibit A for the Board's convenience). CAL FIRE's staff of registered professional foresters ("RPFs") walked the ground, overflew the SJWC acreage in a helicopter, studied Geographical Information Systems ("GIS") data overlaid onto orthophotography, and studied historical maps from the late 1940's. CAL FIRE exercised its expertise and relied upon substantial evidence in the administrative record to determine that SJWC owned

in excess of 2500 acres of timberland. Accordingly, the Board should uphold CAL FIRE's determination and deny this appeal.

Factual and Procedural Summary

SJWC, through its contractor Big Creek Lumber Company ("Big Creek") submitted its original application for an NTMP on about October 28, 2005. (Administrative Record ("AR") at 1828) This application was withdrawn and resubmitted in June 2006. In both instances, the review team questions posed to the applicant required an analysis of the acreage of timberland owned by SJWC. (AR at 583) The number of timberland acres owned by an NTMP applicant is the threshold for determining whether an applicant is eligible to obtain an NTMP (PRC section 4593.2(b)). PRC section 4593.2(b) requires that a nonindustrial tree farmer own less than 2,500 acres of timberland. A six day preharvest inspection took place between August 15, 2006 and January 24, 2007 and included review team questions on actual timberland acreage owned by SJWC. (AR at 1195)

The issue of acreage remained open and SJWC's contractor Big Creek submitted a letter on May 10, 2007 which detailed the analysis undertaken by Big Creek to determine the exact acres of timberland under SWJC ownership. (AR at 1234-1235.) This letter described the methodology employed by Big Creek: SJWC property lines were digitally overlaid onto multiple sets of aerial photographs showing multiple years; LiDar (Light Detection and Ranging) coverage of the majority of the ownership was used to map features on the ground including vegetation characteristics; on ground field testing also was used. Using all these techniques, Big Creek determined that the SJWC timberland ownership was approximately 1,971 acres. However, even though Big Creek determined that the species of commercial trees on the acreage, defined in the Forest Practice Rules ("FPRs") for the Coastal District as Group A Commercial Species A and Group B Commercial Species, fell below Big Creek's calculation of 15 cubic feet per acre over an eighty (80) year

period, [1] Big Creek revised its acreage estimate to account for some acres containing individual commercial species trees.

A public interest group known as "NAIL" also submitted data on the total acreage of timberland owned by SJWC. (AR at 2753-2788) This study estimated that SJWC's timberland ownership comprised 2,748 acres of timberland. (AR at 2770) CAL FIRE then requested data from both NAIL and Big Creek in order to complete its own independent evaluation of the timberland acreage as required by FPR 898.1 and 898.2(c). (AR at 1832)

CAL FIRE looked at three sets of data, one from NAIL and two from Big Creek. After reviewing the three data sets, CAL FIRE decided to use only the Big Creek data in its analysis[2]. (AR at 1882) CAL FIRE then reviewed the definition of timberland in the FPA which defines "timberland" as "land, other than land owned by the federal government and land designated by the board as experimental forest land, which is available for, and capable of, growing a crop of trees of any commercial species used to produce lumber and other forest products, including Christmas trees." (PRC section 4526) CAL FIRE then compared the two sets of orthophotographs (digital photographs corrected for topography) and added timber type layers identified by Big Creek as overlays. (AR at 1882) CAL FIRE staff then spent several days in the field comparing the typing in the photographs with what could be observed on the ground. This field review also included searching for evidence of historical stands by identifying snags and young saplings of Commercial Species types. CAL FIRE also overflew the SJWC ownership in a helicopter and observed additional areas both inside and outside the type boundaries identified by SJWC.

Based upon these analytic steps, CAL FIRE, through its RPF Rich Sampson, came to three conclusions. The first conclusion was a low estimate of 1,985 acres of existing well stocked acres. The middle estimate of 2,405 acres included all lands where SJWC identified timber currently growing, including

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[1] This definition was derived in part from language in the Timber Productivity Act, not the FPA.
[2] The memo explaining what this data consists of is attached hereto as Exhibit B.

parcels not identified by SJWC. The final estimate, which is CAL FIRE's estimate, found 2,825 acres that met the definition of timberland. This estimate included acres that SJWC did not count that had historically supported stands of commercial species where evidence of commercial species coming back was present. (AR at 1887)

Based upon the RPF's conclusions, CAL FIRE's Director Ruben Grijalva sent a notice of ineligibility to Big Creek on September 25, 2007. This appeal timely followed.

Legal Argument

After a hearing on an appeal, the Board determines whether, on the record before it, the NTMP is in conformance with the rules and regulations of the Board and the provisions of the FPA. (FPR 1054.8) However, the standard of review that the Board applies in determining whether an NTMP conforms to the rules and the provisions of the FPA is defined by a long series of cases. The Board independently reviews CAL FIRE's interpretation of the FPA. Nonetheless, the standard of review for an appeal grounded in a statutory interpretation exists in statute and case law and supports a degree of deference to CAL FIRE's decision. While the Board makes its own independent interpretation of a statute such as PRC section 4526, CAL FIRE's interpretation is entitled to consideration and respect. (Yamaha Corporation of America v. State Board of Equalization (1998) 19 Cal.4th 1, 4) Furthermore, when an agency has based its decision upon technical data and has provided a full description of its methodology, that presumption of the validity of the agency's interpretation is given more weight. (Id. at 8) Thus, where, as here, CAL FIRE has provided a thorough analysis of the scientific methodology it used to determine the acreage of SJWC that met the definition of timberland, that opinion is entitled to greater deference. CAL FIRE has the statutory obligation to determine what lands comprise timberland and has exercised that expertise over many years and many projects, CAL FIRE's determination of what land can be identified as timberland is due considerable deference.

The approval of an NTMP is part of the Board's functional equivalent program under the California Environmental Quality Act ("CEQA") PRC section 21080.5. Thus, the Board reviews CAL FIRE's decision pursuant to PRC sections 21168 and 21168.5, which provide that an agency's decision will not be overturned unless the agency has not proceeded in accordance with law or has failed to rely upon substantial evidence in the record. In Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. (1984) 467 US 837, 844, the Supreme Court ruled that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Likewise, here the Board should not substitute it's or SJWC's interpretation of the definition of timberland for the interpretation made by CAL FIRE. Thus, CAL FIRE's determination that SJWC owned in excess of 2500 acres of timberland is entitled to great deference and a presumption of correctness. (Foster v. Civil Service Commission of Los Angeles County (1983) 142 Cal.App.3d 444, 453)

CEQA courts have addressed the issue of a disagreement among expert testimony or opinion, ruling consistently that the reviewing court does not substitute its opinion for that of the decision making agency. In Laurel Heights Improvement Association v. Regents of the University of California (1988) 47 Cal.3d 376, 393, the California Supreme Court ruled that a court may not set aside approval of an agency decision simply because another conclusion would have been equally or more reasonable. The court does not weigh conflicting evidence to determine which party has the better argument. (Id.). Likewise here, SJWC may argue that its method of determining total acres of timberland is better or more accurate than the method employed by CAL FIRE, a contention CAL FIRE disputes. However, that is not the standard of review sanctioned by the California Supreme Court. CAL FIRE engaged in a thorough analysis of Big Creek's methodology and then used Big Creek's own data to perform its own independent analysis. CAL FIRE based its conclusion on substantial evidence it developed through several scientifically accepted sources. CAL FIRE provided SJWC a complete explanation of why the acreage estimate submitted by Big

Creek was inaccurate. Thus, the Board does not decide whether Big Creek's estimate is reasonable, but whether CAL FIRE's estimate is reasonable and grounded in substantial evidence.

Argument

This appeal turns on one issue – what is the correct method for determining whether land meets the statutory definition of timberland. No court has decided this issue and the Board has not adopted any regulations that directly address it. The Board has adopted regulations that define what species of trees are "commercial species." Those trees are identified in FPR 895.1 and many of these species have been identified on SJWC lands, both today and historically. The definition of "timberland" says:

"Timberland" means land, other than land owned by the federal government and land designated by the board as experimental forest land, which is available for, and capable of, growing a crop of any commercial species used to produce lumber and other forest products, including Christmas trees. Commercial species shall be determined by the board on a district basis after consultation with the district committee and others." (PRC section 4526)

The key provisions in this definition do not require the present existence of commercial species but provide that the land must be capable of growing commercial species and available for growing those species. (2008) Merriam-Webster Online Dictionary defines "capable" as "having attributes (as physical or mental power) required for performance or accomplishment" or "having traits conducive to or features permitting." These definitions describe conditions favorable to accomplish a goal, such a growing a crop of commercially harvestable tree species. Thus land that has attributes conducive to growing commercial species will be defined as timberland even if the land does not currently have stands commercial species.

(2008) Merriam-Webster Online Dictionary defines "available" as "present or ready for immediate use" "accessible, obtainable" or "present in such chemical or physical form as to be usable." By applying this language to timberland, it describes land that is accessible to growing trees. Reading these two words

together, PRC section 4526 defines land that can grow commercially harvestable species and that is available for tree growth. Here, CAL FIRE found 2,825 acres of land that demonstrated soil conditions conducive to growing commercial species, commercial species on site and commercial species recovering without active management after two catastrophic fire events. (AR at 1887) These conditions meet both the "capable of" and "available for" language in PRC section 4526. Thus while not all acres identified by CAL FIRE as timberland currently contain harvestable commercial species, indications of commercial species were present on all identified acres.

CAL FIRE has developed a policy, available to the public and used by CAL FIRE RPFs, to analyze what is timberland. The policy begins by noting that this determination is often a matter of professional forestry judgment – a sentence quoted by Big Creek in its May 10, 2007 letter. (AR at 1234-1235.) The policy then provides five criteria that may be used in combination to determine if land is timberland. These are:

- Commercial species present on the site, regardless of size or density.
- Stumps of commercial species present on the site.
- Soil and conditions similar to those on nearby sites supporting stands of commercial species.
- Soils on the site primarily suited to timber growing.
- County assessor's records, land office survey notes, cruise records, aerial photographs, or other records documenting the site once supported a growth of commercial species. (Timberland Policy 5412 dated June 1991)

Curiously, although Big Creek quoted the first sentence of this policy, thus demonstrating its familiarity with it, its analysis does not demonstrate use of three of the five factors described. Nowhere in its analysis is there a discussion of stumps or soil conditions similar to nearby stands of commercial species or soils primarily suited to timber growing. Despite the use of historical photographs by Big Creek, their analysis

nowhere contains any discussion of the stands of timber visible on the 1940 photographs reviewed by CAL FIRE staff. Thus SJWC appears to define as timberland only that land with actual commercial species currently standing on it at a certain minimum level of productivity - a requirement that is nowhere defined in the FPA, the FPRs or Policy 5412. In fact, Policy 5412 specifically states that the existence of commercial species on site *regardless of sizes or density* is a factor to be used in determining the existence of timberland.

In more narrowly defining its definition of timberland, Big Creek appears to rely upon a definition partially drawn from the Timberland Productivity Act of 1982 (Government Code sections 51101 et seq.) The definition of "timberland" in Government Code section 51104 uses the exact same language as the definition in PRC section 4526 but adds the following language: "and which is capable of growing an average annual volume of wood fiber of at least 15 cubic feet per acre." This is part of the analysis Big Creek used although they added another qualifier, not found in the Timberland Productivity Act ("TPA") or the FPA – the 80 year growth period. (AR at 1234) While the Big Creek letter attributes this 80 year growth factor to CAL FIRE, it does not exist in CAL FIRE policy or in the FPA or FPRs.

The TPA was enacted after the FPA and addresses a specific purpose, to create a favorable tax basis for timberland owners, creating a yield taxation system. In Clinton v. County of Santa Cruz (1981) 119 CalApp.3d 927, the court examined the predecessor act to the TPA, the Forest Taxation Reform Act ("FTRA"). The court expressly interpreted the definition of timberland in the FTRA to mean lands not in fact being presently used for timber production. (Id. at 933) The court ruled:

"In our view, the definitions of "timber" and "timberland" contained in section 51100 subdivisions (e) and (f) respectively, ought not to be measured by any one owner's past forest practices or subjective intent. Rather, we conclude that land is "maintained for eventual harvest for forest products purposes" and "devoted to and used for growing or harvesting timber" for purposes of subdivisions (e) and (f) of section

51100, when it is inherently capable of being so used or maintained and has not, by prior activity, been rendered unsuitable for forest product purposes." (Id. at 935)

Thus, even the TPA definition as incorporated from the FTRA acknowledges that timberland includes more than land under active present harvest. Big Creek should have included acres that exhibited historica stands of commercial species, particularly when those species, despite lack of forest management for forestry purposes, demonstrated a visible regeneration.

It is also important to note that the Legislature could have amended the FPA at the time it enacted the TPA to make the two definitions of "timberland" synonymous. The Legislature did not so choose. Thus, the lack of the productivity element in PRC section 4526 must be considered deliberate. Courts have consistently ruled that statutory language shall be given a plain and commonsense meaning. (Ailanto Properties, Inc. v. City of Half Moon Bay (2006) 142 Cal.App.4th 572, 582, citing Coalition of Concerned Communities, Inc. v. City of Los Angeles (2004) 34 Cal.4th 733, 737) Here, the FPA does not incorporate the productivity element used by Big Creek into its definition of timberland.

By contrast, the CAL FIRE analysis demonstrates a more thorough look at both current and historical indications that commercial species grew or are growing on many acres of SJWC land not identified as timberland by Big Creek. (AR at 1882-1187) CAL FIRE used Big Creek's own data as a starting point and began a thorough analysis of what individual tree identification on specific acres should mean. For instance, if density approached 3 or more trees per acre and two trees are growing on similar soils with the same aspect CAL FIRE opined that might mean the entire area with those conditions should be typed as timberland. (AR at 1883) This indicates use of the soil typing factor and the species factor from Policy 5412 not used by Big Creek.

The last crucial difference between the Big Creek analysis and CAL FIRE's analysis is the use of historical photographs to compare stands of timber prior to two big fire events on the SJWC ownership and

the beginning of stand return evidenced by snags and young saplings pushing up through the canopy as shown on historical maps from the late 1940's. (AR at 1883-1887) CAL FIRE's analysis compared the historical stands of commercial species, demonstrating that acreage's capability to grow commercial species and the visual evidence of commercial species regeneration after two catastrophic fires and despite a lack of forest management. This regeneration demonstrates that the acreage is available for the growing of commercial species and the trees are taking advantage of that availability.

Thus, a comparison of the two analyses reveals that, while both are detailed, Big Creek failed to use several policy factors in its analysis of SJWC's ownership. This led to an estimate of timberland acres that fell below the 2500 acre maximum. However by failing to account for historical stands and returning stands, this analysis does not meet the "capable of" or the "available for" portion of the FPA definition of timberland. Therefore, it is a fatal flaw to this appeal.

Conclusion

In its analysis of SJWC's acreage of timberland, CAL FIRE has given full effect to PRC section 4526, analyzing both the land's capability of and availability for growing commercial species as defined by the Board. This analysis came to the conclusion that SJWC exceeded the 2500 acre limit on timberland, thereby becoming ineligible under PRC section 4593.2(b) to obtain an NTMP. Substantial evidence in the record supports CAL FIRE's determination. Therefore, CAL FIRE respectfully requests the Board uphold CAL FIRE's decision and deny this appeal.

Dated this September 26, 2008

Robin Harrington
for:

GINEVRA CHANDLER
Attorney for CAL FIRE

EXHIBIT A

TIMBERLAND 5412

(No. 3 June 1991)

Determining whether a particular site constitutes timberland as defined by PRC §4526 often is a matter of professional forestry judgment.

However, one or combinations of the following criteria are good determinants:

- Commercial species present on the site, regardless of size or density.
- Stumps of commercial species present on the site.
- Soil and conditions similar to those on nearby sites supporting stands of commercial species.
- Soils on the site primarily suited to timber growing.
- County assessor's records, land office survey notes, cruise records, aerial photographs, or other records documenting that the site once supported a growth of commercial species.

FORMS AND/OR FORMS SAMPLES: RETURN TO ISSUANCE HOME PAGE FOR FORMS/FORMS SAMPLES SITE LINK.

(See next section)

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EXHIBIT B

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9-11-08
WE

STATE OF CALIFORNIA—THE RESOURCES AGENCY ARNOLD SCHWARZENEGGER, *Governor*

DEPARTMENT OF FORESTRY AND FIRE PROTECTION
6059 Highway 9
FELTON, CA 95018
(831) 335-5355
Website: www.fire.ca.gov

September 10, 2008

#1-06NTMP-012 SCL

To complete my evaluation of the Big Creek Lumber Co. (BCL) estimate of total timberland acres owned by San Jose Water Co. (SJWC) I used several data sources and compared them using a GIS I modified. Original data coverage's were provided by BCL. I compared the coverage's showing timberland extent to digital orthophotography purchased by CAL FIRE. The data was then ground truthed by department foresters both on the ground and from helicopter overflights. As a check, I compared the data with historical photography archived by the department in the Felton office.

After comparing the original data layers with ground, photo and aerial information, I digitized additional areas that I determined to meet the definition of timberland. Using this revised coverage I calculated a revised estimate of timberland owned by SJWC.

After releasing my findings in a memo to the department I received several requests for the data. In addition to the memo (including photo's), numerous emails were entered into the NTMP review official record in Santa Rosa. This info was released in the Public Records Act (PRA) request by Mr. Carr. Several entities requested the data used in my GIS estimate. Copies of the .shp files were delivered by CD to both BCL and Neighbors Against Irresponsible Logging simultaneously. Review of this data requires the utilization of GIS software.

Additional requests were made for copies of the digital aerial orthophotographic imagery used in my evaluation. This data was purchased by CAL FIRE and in order for it to be released additional licenses would need to be obtained from the vendor. To my knowledge, none of the PRA requesters obtained or utilized this imagery. I understand that they obtained or had their own imagery from other sources.

The department's response to requests for copies of the historical photography was for the requester to make an appointment to view it at the Felton office. To my knowledge only 3 individuals reviewed the historical photos since the release of my memo.

Richard Sampson
RPF #2422
Division Chief
Resource Managment